

NCN: [2016] UKUT 0426 (AAC)

Appeal No. NT/2016/33

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Transport)
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 9 May 2016

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr George Inch	Member of the Upper Tribunal
Mr David Rawsthorn	Member of the Upper Tribunal

Appellant:

Anthony Joseph Baxter t/a Baxter's Transport

Attendances:

For the Appellant: The Appellant was not present and was not represented

For the Respondent: Ms Jones, BL, instructed by the Departmental Solicitor's Office

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.

Date of hearing: 20 September 2016

Date of decision: 27 September 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED to the extent that we have found below that the Appellant's application was dealt with under the incorrect legislative provisions and that he was informed that the application had been refused under the wrong legislative provisions. We substitute, however, our own decision which is to the same effect as that of the Head of the Transport Regulation Unit ('Head of the TRU'), namely that the Appellant's application for a variation direction under section 16(1)(g) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 ('the 2010 Act') is refused under section 17(1).

SUBJECT MATTER:- Variation

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd & Peter Wright v Secretary of
State for Transport [2010] EWCA Civ. 695; 34/2000 Solent Travel Ltd; 2009/030
Pilkingtons Accrington Ltd. t/a King Travel

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Head of the TRU to refuse the Appellant's application for a variation in his goods vehicles operator's licence.
2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-
 - (i) The Appellant holds a Standard International Licence ("the licence") authorising the use of one vehicle and one trailer from an operating centre based in County Fermanagh.
 - (ii) On 9 March 2016 an application for a variation to the licence was received in the Department's Central Licencing Office. The variation sought was a change of operating centre to an address in County Tyrone. The Declaration at page 7 of the variation application was not signed and the form itself was not dated.
 - (iii) At page 15 of the relevant variation application form there is guidance on the manner in which the operator's responsibility to advertise the variation application in one or more local newspapers which circulate in the localities of both the former and proposed operating centres might be discharged. Amongst other things the guidance stated:

'If you do not do this correctly you may face the extra cost and the delay of having to re-advertise, or your application may be refused.'
 - (iv) Accompanying the variation application form which had been placed on 25 February 2016 in a newspaper in County Tyrone. The advertisement stated:

'Baxters Transport
I want to park my lorry and trailer at [an address in County Tyrone].'
 - (v) On 29 March 2016 a Caseworker in the Central Licencing Office wrote to the Appellant acknowledging receipt of the variation application but also indicating that additional information was required by the Department before the application could be considered. The correspondence stated:

'... the advert submitted in support of your application is unacceptable. The wording was incorrect and thus misleading to local residents because the proforma that was attached to the application has not been completed.

You must ensure the publication of a fresh advertisement by no later than 19th April 2016, using the enclosed proforma....

It is imperative that the following is included in your new advertisement:

 - The heading *Goods Vehicle Operator's licence*
 - The operator's full name (the entity that holds the licence)
 - Your address of correspondence (to enable potential representors to submit their representations to you)
 - Indication that you are changing an existing licence

- The final paragraph at the end of the enclosed proforma ...'
- (vi) The Appellant was also requested to complete the answers to certain questions on the variation application form.
- (vii) There was no reply to the correspondence dated 29 March 2016. On 25 April 2016 the Caseworker wrote to the Appellant again indicating that the additional documentation which had been requested in the correspondence of 29 March 2016 remained outstanding. The Appellant was informed:
 - '... you must now respond in full no later than 9 May 2016. If on that date the application remains incomplete, it will be refused. Should this happen, you will have to re-apply for a licence and meet again the application fee plus the cost of placing a fresh advertisement.'
- (viii) On 28 April 2016 items of correspondence were received from the Appellant in the Central Licencing Office. These included completed pages from the variation application form including a signed declaration. There was also a copy of an advertisement which had been placed in a newspaper in County Tyrone on 21 April 2016. The advertisement was headed 'Goods Vehicle Operator's Licence.' It then read:
 - 'Baxter Transport, trading as Baxter Transport of [an address in County Tyrone] is applying for a licence to use [an address in County Tyrone] as an operating centre for 1 goods vehicle and 1 trailer.
 - Owners or occupiers of land [including buildings] near the operating centre(s) who believe that their use or enjoyment of that land would be affected, should make representations to the DOE ... stating their reasons, within 21 days of this notice. Representors must at the same time send a copy of their representations to the applicant at the address given at the top of this notice ...'
- (ix) The Appellant also forwarded a handwritten letter in the following terms:
 - 'I have closed my operating centre at {an address in County Fermanagh} and have moved to [an address in County Tyrone].
 - I enclosed [sic] paper cutting for my operator's licence.'

The decision-making process giving rise to the appeal

3. In the file of papers which is before the Upper Tribunal is a lengthy document titled 'Variation Application Referral'. The document is headed as follows:
 - 'OFFICIAL: Not for disclosure to any third parties without the specific consent of the Head or Deputy Head of the Transport Regulation Unit'
4. Thereafter the first section of the 'Variation Application Referral' document appears to be an internal Departmental memorandum from a Caseworker to a 'Team Leader' and the Head of the TRU. The relevant extracts from the first section of the memorandum are as follows:
 - 'RECOMMENDATION & LEGISLATION**
 - Both the representation and objections periods have expired with no opposition being received.
 - The DVA intel check was returned with a green rating and no issues highlighted. However, the application remains incomplete.
 - Mr Baxter has not confirmed a correct telephone number and the number of sufficient parking spaces available at his nominated operating centre.

Further, Mr Baxter failed to state the full and correct address of his nominated operating centre. I have googled ... which reveals a residential building. Google yields no valid results when you search the full address.

As the operator has failed to advertise within the statutory time period and failed to follow the prescribed requirements, I recommend the advert is refused under the provisions of Section 10(1) of the 2010 NI Act.

I further recommend a letter is sent to Mr Baxter warning him that use of an unauthorised operating centre will lead to regulatory action being taken against the licence.

He should also be reminded if he submits another variation application, the advertisement should accurately follow the prescribed requirements.

5. The second section of the 'Variation Application Referral' document is a recommendation from the 'Senior Team Leader'. The relevant extract from this section is as follows:

'I agree with the recommendation to refuse the application under the provisions of Section 10(1) of the 2010 Act in view of the applicant's failure to meet the advertising requirements. In addition to the issues with the advert noted above, Mr Baxter has also failed to state his name as required under Schedule 2(1) of the 2012 Regulations, which specifies that an advert must state the name of the applicant. This requirement should also be made clear to the operator should he choose to re-apply.

I also agree that Mr Baxter be reminded that he has no authority to use [an address in County Tyrone] as an operating centre and that unauthorised use may lead to regulatory action being taken against the licence.'

6. The final section of the 'Variation Application Referral' document is headed 'Head of TRU's decision'. The relevant extract from this section is as follows:

'I have considered this application to add an operating centre and the submissions above.

The applicant has met with DHTRU previously and has also been asked to re-advertise in respect of this application once previously. A timeframe within which that should be carried out was provided. The second advert was 2 days out of time and therefore Section 10(2) has not been made out. As Section 10(2) has not been made out there is no discretion to consider Section 10(3) of the 2010 act. Pursuant to Section 10(1) of the 2010 act the application must be refused.

The application is refused pursuant to Section 10(1) of the 2010 act.

Please issue the reminder in respect of using the proposed operating centre as recommended above.

Please also include some advice and guidance that should the applicant wish to apply to add this or another operating centre in the future it is vital that the requirements for form, content and timing of the advert are adhered to.

7. The section headed 'Head of TRU's decision' is dated 9 May 2016.
8. On 12 May 2016 correspondence from the Caseworker was sent to the Appellant. The relevant extracts from the correspondence are as follows:

'I refer to you application for an operator's licence dated 9 March 2016 and my recent letter warning of the consequences should you fail to provide proof that you have placed a valid newspaper advertisement as required under Section 10(2) of the above Act.

Your advertisement failed to satisfy the prescribed statutory requirements. I must now advise you that as you have failed to comply with the prescribed requirements, your application has been refused under Section 10(1) of the Act.

...

You are advised that you cannot lawfully operate vehicles for which an operator's licence is required until you either submit a fresh licence application which is granted by the Department, or you lodge an appeal to the Upper tribunal which succeeds in overturning the decision to refuse this application.

You are also reminded pursuant to Section 6(1) of the above Act, you are not authorised to lawfully operate from ... If you contravene the aforementioned legislation, you are guilty of an offence and regulatory action will be taken against you.

If you wish to operate from the aforementioned operating centre you must apply for authority by submitting a publishable variation application along with an advert and a non refundable application fee of £254.

You must ensure your advertisement fully meets the prescribed requirements and ensure it is correctly worded and published within the 21 day statutory period.'

The appeal to the Upper Tribunal

9. On 9 June 2016 an appeal was received in the office of the Upper Tribunal. The Appellant set out the following grounds of appeal:

'I was turned down for sending in my advert two days too late.

The paper sent the wrong one the first time so I am sending a copy of the one that was 2 days late.

I always had an 'O' licence and never any bother with anyone.

The reason I moved to a new parking 'O' centre was my old one had too many lorries.

I phoned Leeds and was told the reason was two days too late.

I hope you find this o.k. I have only one truck and trl. I only work it to do odd jobs.

As I am on the border with the ROI I need the licence. I also paid my fee and this will all happen when I moved my centre.'

Proceedings before the Upper Tribunal

10. The hearing before the Upper Tribunal was listed for 20 September 2016. In advance, the Appellant was requested to indicate whether he would be attending the oral hearing and/or whether he would be represented. The appellant replied to indicate that he would not be attending the oral hearing and that he would not be represented. He added:

I will leave this case in judgement. I think that I did nothing wrong. I was two days late with sending in the ... from the paper. I never was in trouble with VOSA or any Traffic Commissioner. As I live on the border I need my 'O' licence to go to the rep of Irl as my work this time of year is farm straw and coming to Xmas is M&S shops.

Hope you find this ok for me as I have paid my fee for change of new 'O' centre.'

11. At the oral hearing, the Respondent was represented by Ms Jones BL. Ms Jones had prepared a Skeleton Argument for which we were grateful.

The proper approach on appeal to the Upper Tribunal

12. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: *"the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view"*. The Tribunal sometimes uses the expression *"plainly wrong"* as a shorthand description of this test.'

13. At paragraph 4, the Upper Tribunal had stated:

'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

The Respondent's concession

14. In her Skeleton Argument, Ms Jones made the following concession on behalf of the Respondent:

'The Respondent refused the application for a variation of the existing licence on the grounds that the Applicant failed to satisfy the prescribed statutory requirements under Section 10(1) of the Goods Vehicle (Licensing of Operators) Act Northern Ireland 2010.'

The Department in preparing this matter for hearing has discovered that the decision letter cites the above legislation. This legislation relates to applications for a licence and not for applications to vary existing licences. In fact, the application should have been properly refused under Section 17 (1) of the Goods Vehicle (Licensing of Operators) Act Northern Ireland 2010.

Both parts of the legislation are similar in that there is a period of 21 days before and up to 21 days after the application is made, for an advert to be placed. In respect of both pieces of legislation, the advert was placed 2 days outside the statutory timeframe and there is no discretion to extend this. The Respondent however concedes that the decision appears to have been made and subsequently issued under the wrong legislation. While the Department may consider a review of this decision under Section 34 of the 2010 Act, the outcome would remain the same.'

...

The Respondent accepts that it erred in taking its decision under Section 10. This error was noticed during the preparation of this matter.

However in so applying the correct legislation at Section 17 (1) and Section 17 (3) the Respondent would state that they must refuse this application under this legislation for the exact same reasons as outlined below.

The Appellant was asked to re-advertise to meet the statutory criteria as laid out in Section 17 (3) of the 2010 Act. He was provided with a statutory timeframe for so doing. The Appellant failed to comply with this requirement.

As Section 17 (3) has not been made out there is no discretion to consider the granting of such a variation and the application must be refused, pursuant to 17(1) of the 2010 Act.

In failing to advertise before the 19th April 2016 the Appellant failed to meet the criteria which were clearly set out to him in a letter dated the 29th March 2016. In failing to do so the Respondent must refuse to grant the variation application.

The Respondent accepts the reason for the refusal was communicated to the Appellant under the incorrect Section of the legislation and in so doing has erred. However, for the reasons set out above the Respondent would contend that the variation application must still be refused under Section 17(1) of the 2010 Act.'

15. In her further submissions at the oral hearing, Ms Jones asserted that the appeal should be allowed but invited the Upper Tribunal to substitute its own decision to the same effect as that of the Head of the TRU.

The Respondent's submissions on the Appellant's grounds of appeal

16. In her Skeleton Argument, Ms Jones made the following submissions on the Appellant's grounds of appeal:

'The appellant relies on the following grounds of appeal. The Respondent wishes to reply to each as follows:

'I was turned down for sending in my advert two days too late./ 'My advertisement in the newspaper was sent in to Leeds but it was two days late when it arrived so they refused.'

The Respondent would state that the grounds for the decision was that the Appellant did not meet the statutory criteria set out in section 10 (2) of the 2010 Act and as such the Respondent shall refuse the application. It is now accepted that this decision should have been grounded under Section 17. The advertisement was not placed into the relevant newspaper until 2 days after the timeframe had elapsed. While evidence of the advertisement was not received by the Respondents until the 28th April 2016 and was outside the clear dates set out by the Respondent to the Appellant, the decision to refuse was predicated on the date the advertisement appeared in the newspaper. It is correct that the advertisement was outside the statutory timeframe set down in both Section 10 (2) and Section 17(3) of the 2010 Act.

'The paper sent the wrong one the first time so I am sending a copy of the one that was 2 days late'

The Appellant is required to meet the statutory criteria and the burden is on him to do so. The advert was not placed into the paper until the 21st April 2016.

'I always had a licence and never any bother with any one.'

The Respondent would state that the Appellant has been operating under a standard international licence since November 2011. Any previous history that may be associated with this licence did not form any part in this decision.

'The reason I moved to a new parking 'O' centre was my old one had to many lorries.'

The Respondent would state that the Appellant must operate from his designated Operating Centre to comply with the conditions of his licence. In order to change his operating centre he must apply to vary his operating centre and the Respondent must grant that variation request. The Appellant made such an application, which was received on the 9th March 2016. The variation request was refused and therefore the Appellant was informed that he could not operate from this other centre.

'I paid my application fee.'

It is accepted that the Appellant paid the correct fee.'

Analysis

17. The concession made by the Respondent is correct. As was noted above, in the 'Variation Application Referral' document reference is made by the Caseworker, the Team Leader and the Head of the TRU to a refusal of the variation application on the basis that the requirements set out in section 10 of the 2010 Act were not met.
18. In a similar manner, the correspondence dated 12 May 2016 which was sent by the Caseworker to the Appellant makes reference to an 'application for an

operator's licence' and to a refusal of that application because the requirements of section 10 of the 2010 Act have not been met.

19. Section 10 sets out the requirements for the publication of a notice of an *application for a licence in a locality affected*. Section 10 is clearly concerned with applications for new licences.
20. Despite the narrative in the 'Variation Application Referral' document making reference by all three parties to the fact that the application was for a variation of a licence, the basis for the initial recommendations and eventual refusal is clearly stated to be section 10 of the 2010 Act. As was noted above, the correspondence dated 12 May 2016 is even more stark in making reference to an application and not a variation and in confirming the disallowance under section 10.
21. Everyone got it wrong. There was no *de novo* application for a licence by the Appellant. He sought to apply for a variation in his extant operator's licence wishing to specify a new place as an operating centre. To the extent, therefore, that the Appellant's application was dealt with under the incorrect legislative provisions and that he was informed that the application had been refused under the wrong legislative provisions, the decision of the Head of the TRU is set aside as being in error.
22. We are, however, in a position to re-make the decision of the Head of the TRU which is to the same effect.
23. The Appellant's application for a variation in his extant operator's licence should have been dealt with under sections 16 to 19 of the 2010 Act. The variation application was made under section 16 and was a request for the Department to make a variation direction under section 16(1)(g).
24. Under the provisions of section 17(1) of the 2010 Act the Department *must* refuse an application for a variation direction made under section 16(1)(g) without considering its merits unless it is satisfied that the requirements in section 17(3) have been complied with. The requirements in section 17(3) are concerned with publication of a notice of a variation application (such as a variation place specified as an operating centre) in a locality affected. Section 17(3) is in parallel terms to section 10(3).
25. The evidence which was available to the Respondent clearly showed that the requirements of section 10 (3) were not met. That same evidence is now available to the Upper Tribunal and it clearly shows that the requirements of section 17(3) have not been met. Accordingly, the application for a variation in the licence must be refused under section 17(2).
26. For the sake of completeness we would add that for the reasons which have been set out by Ms Jones in her Skeleton Argument, and as expanded on in her oral submissions, we reject the Appellant's grounds of appeal. The Appellant has submitted that he is a competent operator who has always complied with the requirements imposed on a licence holder. We have no reason to doubt that submission. He also submits that he was only two days late in publishing notice of his variation application. In order to have his application for a section 16(1)(g) variation direction considered by the Department he would have to have complied with the requirements of section 16(3). The evidence shows that he did not comply with those requirements. The refusal in those circumstances is mandatory. In addition, we have noted that the Appellant did not also comply with additional application requirements

such as the publication of the proper name of the applicant, the complete and correct address of his operating centre and the specification of the number of parking spaces. In addition, the Appellant was given two opportunities to attend to the relevant requirements and failed so to do.

27. Accordingly, we allow the appeal but substitute our own decision that the application for a section 16(1)(g) variation direction is refused. The Appellant is asked to note the caveats which were set out in the correspondence dated 12 May 2016 concerning use of an unauthorised operating centre remain apposite as does the guidance on the possibility of making a fresh variation application.

Another matter arising

28. Finally we turn to an issue which was not raised by the Appellant but we wished to address in line with our inquisitorial role. The issue concerned the rigour and form of decision-making within the Department and the notification of the decision to the Appellant.

29. In its decision in 34/2000 Solent Travel Ltd, the then Transport Tribunal stated the following, at paragraph 11 of its decision:

'We have already commented on the absence of documents and information in the appeal bundle. We believe that it may be helpful if we say rather more on this topic. One of the main functions of the Tribunal is to review the way in which the Traffic Commissioner reached the decision in question. We consider that it is essential, if the Tribunal's function is to be discharged properly and fairly and if justice is to be seen to be done, that the Tribunal should have before it all the material which was before the Traffic Commissioner at the time that the decision in question was taken. Finally we wish to add the following general points:-

- (i) It is normally desirable that every appeal bundle should include a copy of the application for the current operator's licence, any earlier application, if relevant and any application for a variation if relevant. These documents provide a quick and easy way to obtain basic but important information about the operator and the operating centre. No application was included in the present appeal bundle.
- (ii) Every appeal bundle should contain a complete set of correspondence between the Traffic Area Office and the Appellant relating to the matters giving rise to the appeal. In the present case as we have pointed out the enclosure sent with the letter of 7th January 2000 was omitted as was the copy of that letter sent on 7th February 2000.
- (iii) The correspondence in the present case refers to a telephone call on 3rd March 2000. The indication from Mr. Duckworth was that Mr. Donald asserted that there was more than one call. Where possible, (and we accept that it may not always be possible), a note should be made of telephone calls with operators. Without such a note it is likely to be very difficult to resolve any dispute as to the content of the call or whether it did in fact take place. Where there is such a note of a call,

relevant to the matters giving rise to the decision from which there is an appeal, it should be included in the appeal bundle.

- (iv) Every appeal bundle should contain a record of the decision from which there is an appeal. In the great majority of cases this presents no problem because there will either be a transcript of the Traffic Commissioner's oral decision or a copy of a reserved decision. This case falls into a different category because it was a decision made in chambers. The appeal bundle contains no document of any description on which the decision is recorded. In our view this is simply not acceptable. Both the Tribunal and the operator are entitled to know (a) who made the decision in question, (b) on what ground the decision was made and (c) the reason for concluding that the ground was made out. Experience of chambers decisions taken in other Traffic Areas suggests that this information can be adequately provided in a very few sentences. In our view nothing less will enable the Tribunal to be satisfied that the Traffic Commissioner has correctly identified the issue(s) and has correctly applied the appropriate test.'

- 30. In a further decision, 2009/030 Pilkingtons Accrington Ltd. t/a King Travel, the Tribunal stated, at paragraph 5:

'The Traffic Commissioner clearly felt that the Minute dated 16 January 2008, (see paragraph 2(iii) above), ought not to have been disclosed to Mr. Cunningham. In the absence of any other document from which the reason (or lack of reason) for the refusal of the application to cancel the services at short notice can be determined we disagree with that view. In our view the Appellants were entitled to know the basis on which the application was refused and they were entitled to know whether or not the correct test had been applied. In the absence of a reasoned decision or a fully reasoned letter giving the grounds for refusal, (neither of which was provided), it seems to us that disclosure of the underlying documentation was essential. How else could the correctness of the decision be challenged? How else could the Tribunal give reasons for saying either that the decision was wrong or that it was correct?'

- 31. We have noted that the Appellant was informed of the decision by the Head of the TRU through the correspondence of 12 May 2016. At the oral hearing before us, Ms Jones confirmed that the Appellant would not have seen the contents of the 'Variation Application Referral' document referred to above had he not appealed and that the only reference to the Head of the TRU's reasoning would have been as set out in the correspondence of 12 May 2016. We have already noted that to the extent that the correspondence makes reference to the incorrect legislative basis for the decision, the reasoning is wrong. Had there been a reference to the correct legislative basis, we would have been just about satisfied that the correspondence was sufficient to convey to the Appellant the legal and evidential basis of the adverse decision which was made in connection with his application for a variation in his goods vehicle operator's licence. We would encourage the Head and Deputy Head of the TRU to give consideration to the requirements for rigorous decision-making as set out in the jurisprudence of the Transport and Upper Tribunals and implement the relevant principles into practice.

A handwritten signature in black ink on a light grey background. The signature reads "Kenneth Mullan" in a cursive script.

**Kenneth Mullan, Judge of the Upper Tribunal,
27 September 2016**